

**ENTERED**

November 20, 2017

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

KENNETH STEWART,	§
	§
Petitioner,	§
VS.	§ CIVIL ACTION NO. 2:16-CV-514
	§
LORIE DAVIS,	§
	§
Respondent.	§

**MEMORANDUM AND RECOMMENDATION TO DENY APPLICATION FOR  
LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL**

On June 7, 2017, undersigned recommended to Hon. Hilda G. Tagle that Petitioner's § 2254 petition be dismissed as time-barred and that a Certificate of Appealability be denied (D.E. 12). It appears the Memorandum and Recommendation may not have been mailed to Petitioner by the Clerk in a timely manner because on October 31, 2017, another copy of the Memorandum and Recommendation was mailed to Petitioner. On November 13, 2017, Petitioner filed a notice of appeal to the Fifth Circuit Court of Appeals (D.E. 13). On that same date, Petitioner filed his application for leave to appeal *in forma pauperis* (D.E. 14). It is respectfully recommended that the application be denied.

Even if a person is a pauper, leave to appeal *in forma pauperis* should be denied if it is not taken in good faith. 18 U.S.C. § 1915(a)(3); FED. R. APP. P. 24(a). Petitioner filed a premature notice of appeal of the Magistrate Judge's Memorandum and Recommendation. The District Court has not yet ruled on the Magistrate Judge's recommendation. The Court of Appeals has no jurisdiction to hear an appeal of the

magistrate judge's Memorandum and Recommendation. *United States v. Cooper*, 135 F.3d 960, 962-63 (5th Cir. 1998).

It is respectfully recommended that Petitioner's application for leave to proceed *in forma pauperis* (D.E. 14) be denied without prejudice as premature.

Respectfully submitted this 20th day of November, 2017.

  
B. JANICE ELLINGTON  
UNITED STATES MAGISTRATE JUDGE

#### **NOTICE TO PARTIES**

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **FOURTEEN (14) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1), General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within FOURTEEN (14) DAYS after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc).